

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CORTINA M. ROGERS,

Plaintiff,

v.

CAROLYN W. COLVIN, Commissioner of
Social Security,

Defendant.

Case No. C13-5627-RSL-BAT

**REPORT AND
RECOMMENDATION**

Cortina M. Rogers seeks review of the denial of her Disability Insurance Benefits application. She contends the ALJ erred by (1) making step-three findings without obtaining an updated medical opinion from a medical expert, and (2) summarily rejecting the Department of Veterans Affairs disability rating. Dkt. 24. The Court agrees and recommends that the case be **REVERSED** and **REMANDED** for further administrative proceedings.

BACKGROUND

Ms. Rogers was 33 years old on her date last insured, has a high school education, and has worked as a laborer, parts clerk, and dispatcher. Tr. 155, 193, 197. On November 16, 2009, she applied for benefits, alleging disability as of December 1, 2000. Tr. 155. Her application was denied initially and on reconsideration. Tr. 100, 105. After conducting a hearing, the ALJ

1 issued a decision on February 16, 2012, finding Ms. Rogers not disabled. Tr. 21-33. As the
2 Appeals Council denied Ms. Rogers's request for review, the ALJ's decision is the
3 Commissioner's final decision. Tr. 1.

4 **THE ALJ'S DECISION**

5 Utilizing the five-step disability evaluation process,¹ the ALJ found that Ms. Rogers had
6 not engaged in substantial gainful activity since the alleged onset date; she had the following
7 severe impairments: posttraumatic stress disorder, depressive disorder, not otherwise specified,
8 and status post left ulna fracture with open reduction internal fixation; and these impairments did
9 not meet or equal a listed impairment.² Tr. 23-24. The ALJ found that Ms. Rogers had the
10 residual functional capacity to perform light work; she was capable of occasionally fingering
11 with her left hand; she was capable of simple, routine, repetitive tasks and work that involved
12 occasional contact with supervisors and co-workers but no contact with the general public; and
13 she was capable of work that involved few if any changes in the work setting. Tr. 25. The ALJ
14 found that Ms. Rogers was unable to perform any past relevant work but she could perform jobs
15 that exist in significant numbers in the national economy. Tr. 31. The ALJ therefore concluded
16 that Ms. Rogers was not disabled. Tr. 32.

17 **DISCUSSION**

18 **A. Need for updated medical opinion**

19 Ms. Rogers argues that the ALJ erred by making a step-three finding that her mental
20 impairments did not meet or equal a listing without obtaining an updated medical opinion from a
21 medical expert, in violation of Social Security Ruling (SSR) 96-6p.³ Dkt. 24 at 5.

22 ¹ 20 C.F.R. § 404.1520.

23 ² 20 C.F.R. Part 404, Subpart P. Appendix 1.

³ Although SSRs lack the force of regulations, they are binding on all components of the Social

1 Single decision-maker (SDM) Mark O'Neill reviewed Ms. Rogers's case on January 11,
2 2010 and found the evidence insufficient to show that Ms. Rogers was disabled due to her mental
3 impairments during the relevant period. Tr. 389. On January 26, 2010, Thomas Clifford, Ph.D.,
4 signed off on the psychiatric review technique form completed by the SDM, finding insufficient
5 evidence. Tr. 377. The Social Security Administration denied Ms. Rogers's claim on January
6 28, 2010, based on the finding of insufficient evidence to prove she was disabled. Tr. 100.

7 On April 5, 2010, Matthew Comrie, Psy.D., reviewed the evidence and affirmed the
8 determination that there was insufficient evidence of a severe mental impairment before the date
9 last insured. Tr. 393. The SSA denied reconsideration of Ms. Rogers's claim on April 8, 2010,
10 again based on the finding that the evidence was insufficient to determine disability. Tr. 105.

11 Before and after the ALJ hearing, Ms. Rogers submitted over 600 pages of additional
12 medical records. Tr. 397-1015. After considering both the original and the updated records, the
13 ALJ found that Ms. Rogers had medically determinable severe mental impairments and
14 proceeded with the five-step disability evaluation process, including an evaluation of whether
15 these impairments met or equaled a listed impairment and their impact on her residual functional
16 capacity. Tr. 23-24. The ALJ found that the impairments caused Ms. Rogers mild restriction in
17 her activities of daily living; moderate difficulties in her social functioning; moderate difficulties
18 in her concentration, persistence, or pace; and no episodes of decompensation of extended
19 duration. Tr. 24-25.

20 Under 20 C.F.R. § 404.1520a(c), the ALJ must follow a special technique for evaluating
21 mental impairments. If the ALJ determines that the claimant has a medically determinable
22 mental impairment, the ALJ must rate the degree of functional limitation resulting from the

23 _____
Security Administration. 20 C.F.R. § 402.35(b)(1).

1 impairment in four broad areas: (1) activities of daily living; (2) social functioning; (3)
2 concentration, persistence, and pace; and (4) episodes of decompensation. 20 C.F.R.
3 § 404.1520a(c). If the degree of functional limitation in the first three areas is “none” or “mild”
4 and it is “none” in the fourth area, the impairment is generally not severe. 20 C.F.R.
5 § 404.1520a(d). Otherwise, the impairment is severe, and the ALJ must consider whether it
6 meets or equals a listed impairment at step three. To meet the listings at issue here, the claimant
7 must meet at least two of the following criteria (1) marked restriction of activities of daily living;
8 (2) marked difficulties in maintaining social functioning; (3) marked difficulties in maintaining
9 concentration, persistence, or pace; or (4) repeated episodes of decompensation, each of
10 extended duration. 20 C.F.R. Pt. 404, App. 1, § 12.04, 12.06.⁴

11 The ALJ is ultimately responsible for deciding the legal question of whether a claimant’s
12 impairments meet or equal a listing. *See* 20 C.F.R. § 404.1526. In making this decision, the ALJ
13 must consider all the evidence in the case record. 20 C.F.R. § 404.1526(c). The ALJ must also
14 consider the opinion given by one or more medical or psychological consultants designated by
15 the Commissioner. *Id.* Such consultants include consultants hired by the state agency authorized
16 to make disability determinations. 20 C.F.R. § 404.1526(d). As explained in SSR 96-6p,
17 “longstanding policy requires that the judgment of a physician (or psychologist) designated by
18 the Commissioner on the issues of equivalence on the evidence before the administrative law
19 judge or the Appeals Council must be received into the record as expert opinion evidence and
20 given appropriate weight.” The ALJ must obtain an updated opinion from a medical expert
21 when additional medical evidence is received that “in the opinion of the administrative law
22 judge . . . may change the State agency medical or psychological consultant’s finding that the

23 ⁴ A claimant may also meet these listings by satisfying the diagnostic criteria and certain
“paragraph C” criteria, which are not at issue here.

1 impairment(s) is not equivalent in severity to any impairment in the Listing of Impairments.”
2 SSR 96-6p.⁵

3 In considering whether Ms. Rogers’s mental impairments met or equaled a listing, the
4 ALJ considered Ms. Rogers’s testimony, reports in her medical records, and a function report
5 completed by her husband. Tr. 24. But, because the state agency consultants all opined that the
6 evidence was insufficient to establish the existence of a mental impairment, the ALJ considered
7 no state agency medical consultant opinion on the issue of whether Ms. Rogers’s mental
8 impairments met or equaled a listing. This is contrary to the requirement of 20 C.F.R.
9 § 404.1526(c). The state agency consultants reviewed the record before the voluminous
10 additional evidence was received. Their opinions were thus not based “on the evidence before
11 the administrative law judge” as SSR 96-6p and, indeed, “longstanding policy” of the Social
12 Security Administration, require.

13 The Court recognizes that the ALJ has broad discretion in determining whether to call a
14 medical expert to testify. SSR 96-6p requires the ALJ to obtain an updated medical expert
15 opinion if, “in the opinion of the administrative law judge” additional medical evidence may
16 change the state agency consultant’s finding on equivalence. Here, where the state agency
17 consultants had no finding on equivalence due to insufficient evidence, and the additional
18 evidence was sufficient to establish the existence of mental impairments, it is impossible to
19 conclude that the additional medical evidence would not change the consultants’ findings. The
20 ALJ’s failure to obtain an updated medical expert opinion was in violation of SSR 96-6p.

21 The Commissioner argues that the ALJ was not required to obtain an updated opinion
22 because “the ALJ did not seek to make a decision of disability based on medical equivalence.”

23 ⁵ The term “medical expert” as used in SSR 96-6p refers to state agency medical and
psychological consultants, as designated in 20 C.F.R. § 404.1512(b)(6) and § 404.1527(e).

1 Dkt. 26 at 3. But the ALJ did make a finding on equivalence, that Ms. Rogers's impairments did
2 not equal a listing. The fact that the ALJ's finding on equivalence was negative does not
3 eliminate the need to obtain an updated medical opinion. The Commissioner also argues that any
4 error was harmless, as Ms. Rogers has failed to identify what prejudice likely resulted from the
5 error. Dkt. 26 at 4. The ALJ made step-three and residual functional capacity findings without
6 the benefit of any medical expert opinion. The Court declines to find that such an omission is
7 harmless, where, due to the very nature of the error, Ms. Rogers cannot identify what the expert
8 opinion would have been.

9 The Court concludes that the ALJ's finding that Ms. Rogers did not have an impairment
10 that met or equaled a listing is not supported by substantial evidence or free of harmful legal
11 error. The Court therefore recommends that this case be remanded with directions to obtain and
12 consider an updated medical opinion from a medical expert regarding the degree of functional
13 limitation caused by Ms. Rogers's mental impairments and whether these impairments, alone or
14 in combination, met or equaled a listed impairment.

15 **B. VA rating**

16 Ms. Rogers argues that the ALJ erred by summarily rejecting the VA's determination of
17 unemployability. Dkt. 24 at 8. In December 2008, the VA issued a decision increasing the
18 disability rating for Ms. Rogers's PTSD with major depressive disorder from 50% to 70%, and
19 finding that she was entitled to the 100% Individual Unemployability rate effective April 9, 2004
20 because she was "unable to work due to [her] service connected disabilities." Tr. 473-77. The
21 ALJ found that this decision did not provide any guidance to Ms. Rogers's functional abilities
22 and simply contained a conclusory statement that Ms. Rogers was unable to work. Tr. 30. The
23 ALJ noted that the VA determination of disability was not binding. *Id.* And the ALJ found that

1 neither the medical evidence nor Ms. Rogers's activities of daily living supported a finding of
2 disability. *Id.*

3 A determination of disability by another agency such as the VA is not binding on the
4 Social Security Administration. 20 C.F.R. § 404.1504. And yet there is "marked similarity
5 between these two federal disability programs." *McCartey v. Massanari*, 298 F.3d 1072, 1076
6 (9th Cir. 2002). Accordingly, the ALJ must "ordinarily give great weight" to a VA
7 determination of disability, although the ALJ "may give less weight to a VA disability rating if
8 he gives persuasive, specific, valid reasons for doing so that are supported by the record." *Id.*

9 The Court finds that the ALJ did not give persuasive, specific, or valid reasons for
10 rejecting the VA disability rating. Although the ALJ found the VA rating to be conclusory, an
11 attachment to the letter explains that a VA examiner found Ms. Rogers to have "occupational and
12 social impairments with deficiencies in most areas, such as work, school, family relations,
13 thinking, mood, due to some mild suicidal ideations, obsessional rituals, irrelevant or near panic
14 and depression affecting [her] ability to function on a daily basis," and rating her Global
15 Assessment of Functioning score as 45, indicating serious symptoms or a serious impairment in
16 social, occupational, or school functioning.⁶ Tr. 480. Moreover, a rejection simply because the
17 VA's disability rating inquiry is different from the Social Security inquiry is invalid. *See*
18 *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 695 (9th Cir. 2009). And, finally, the
19 ALJ's mere assertion, without explanation, that the medical evidence and Ms. Rogers's daily
20 activities did not support a finding of disability, was neither specific nor persuasive. The Court
21 concludes that the ALJ erred in discounting the VA's disability rating and therefore recommends
22 that the ALJ be directed to reassess the VA rating on remand.

23 ⁶ *See* Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (DSM-IV),
34 (4th ed. text rev. 1994).

CONCLUSION

For the foregoing reasons, the Court recommends that the Commissioner's decision be **REVERSED** and the case be **REMANDED** for further administrative proceedings. On remand, the ALJ should (1) obtain an updated medical opinion from a medical expert regarding the degree of functional limitation caused by Ms. Rogers's mental impairments; (2) reevaluate whether Ms. Rogers's mental impairments, alone or in combination, met or equaled a listed impairment; and (3) further develop the record and continue with the remainder of the five-step disability evaluation process, including a reassessment of the VA disability rating, as necessary.

A proposed order accompanies this Report and Recommendation. Objections, if any, to this Report and Recommendation must be filed and served no later than **May 30, 2014**. If no objections are filed, the matter will be ready for the Court's consideration on that date. If objections are filed, any response is due within 14 days after being served with the objections. A party filing an objection must note the matter for the Court's consideration 14 days from the date the objection is filed and served. Objections and responses shall not exceed twelve pages. The failure to timely object may affect the right to appeal.

DATED this 16th day of May, 2014.



BRIAN A. TSUCHIDA
United States Magistrate Judge